

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Carriage of Digital Television)	CS Dkt. No. 98-120
Broadcast Signals)	
)	

**COMMENTS OF THE
OFFICE OF ADVOCACY, U.S. SMALL BUSINESS ADMINISTRATION**

The Office of Advocacy of the U.S. Small Business Administration

(“Advocacy”) submits these comments to the Federal Communications Commission (“FCC” or “Commission”) in the above-referenced docket.¹

Introduction and Summary

Congress has mandated that full power television stations cease broadcasting analog transmissions on February 17, 2009.² By that date, all providers must switch from analog to digital television broadcast systems.³ In order to ensure that this transition is enacted with as little adverse effect on consumers as is possible, the FCC has proposed a rule to address issues relating to downconversion of broadcasting signals, cable transmission of digital signals, and signal availability.⁴ Small cable companies and the trade associations that represent them have been in contact with Advocacy since 2007 to highlight how the “dual carriage” requirement,

¹ See *Third Further Notice of Proposed Rulemaking*, FCC Dkt. No. 07-170 (rel. Feb. 1, 2008) [hereinafter, Notice].

² See Deficit Reduction Act of 2005, Pub. L. No. 109-171 (2006). Title III, entitled the Digital Television Transition and Public Safety Act of 2005, establishes this deadline for the cessation of analog transmissions.

³ *Id.*

⁴ See Notice, *supra* note 1.

or requirement that cable systems provide consumers with both broadcast and digital signals, will have a negative economic impact on their businesses. Members from the American Cable Association (“ACA”) and the National Cable Television Cooperative, Inc. (“NCTC”) met with Advocacy to discuss alternative ways in which the Commission could still achieve its goal of ensuring cable viewers are minimally affected by the transition, while ensuring that the smallest companies that provide service are not unduly burdened either. Many of these small companies maintain small business customers as well as customers in rural areas, and their ability to provide affordable service in the cable market is thus important.⁵ Furthermore, the small cable operator market is dichotomized as follows: some small systems are “all-analog” and do not provide digital service to their customers, while others that do provide digital service will find a dual carriage requirement onerous due to the restriction on bandwidth. The restricted bandwidth is inherent to the size of the operators, but it is worth mentioning that the all-analog operators would also face the costs of converting to digital, costs that small industry representatives argue are significant.

The FCC specifically requests comment on whether a specific legal basis exists whereby cable companies may be given special consideration in the Commission’s attempt to minimize the impact of this rule on their operations. Advocacy submits that the Regulatory Flexibility Act (“RFA”) requires the FCC to consider the

⁵ The high costs associated with providing service to rural customers compounds the difficulties faced by small cable operators in certain regions.

regulatory burden of this rulemaking on small cable operators and to consider less burdensome regulatory alternatives.

While the FCC has prepared an initial regulatory flexibility analysis (“IRFA”) relating to this proposed rulemaking, the IRFA does not address the impact of the proposed rule on small entities, and does not consider alternatives that would reduce the impact on small entities, both of which it is required to do by the RFA.⁶

1. Advocacy Background.

Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small business before Federal agencies and Congress. Advocacy is an independent office within the Small Business Administration (“SBA”), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. Part of our role under the Regulatory Flexibility Act (“RFA”) is to assist agencies in understanding how regulations may impact small businesses, and to ensure that the voice of small businesses is not lost within the regulatory process.⁷ Congress crafted the RFA to ensure that, while accomplishing their intended purposes, regulations did not unduly inhibit the ability of small entities to compete, innovate, or to comply with the regulation.⁸

On August 13, 2002, President George W. Bush signed Executive Order 13272 that highlights the President’s goal of giving small business owners a voice in

⁶ See Associated Fisheries of Maine v. Daley, 127 F.3d 104 (1st Cir. 1997) and 5 U.S.C. § 603(c), respectively, for an overview of these requirements.

⁷ Pub. No. 96-354, 94 Stat. 1164 (1980).

⁸ Pub. L. 96-354, Findings and Purposes, Sec. 2 (a)(4)-(5), 126 Cong. Rec. S299 (1980).

the complex and confusing federal regulatory process by directing the Office of Advocacy to work closely with the agencies to ensure that the agencies can properly consider the impact of their regulations on small entities.

2. The RFA Provides a Specific Legal Basis for Affording Small Entities Special Consideration in this Rulemaking

The FCC seeks comment on what specific legal basis exists for “affording operators that qualify as small systems special consideration” in the Commission’s attempt to minimize the impact of this proposal on cable operators.⁹ The RFA is the legal basis on which federal agencies can rely when drafting proposed rules in order to reduce the regulatory burden of final regulations on small entities.¹⁰ Indeed, the RFA directs that the FCC conduct a regulatory impact analysis to assess how a proposed rule may affect small entities. The statute also requires that the Commission consider meaningful alternatives to achieving the intended goal of a proposed rule while minimizing any negative impact that the rule’s implementation may have on small businesses. In the rulemaking at hand, the FCC has determined that most cable systems qualify as small entities. For the purposes of the rule,

⁹ Notice, *supra* note 1, at 58.

¹⁰ Pub. L. 96-354, Findings and Purposes, Sec. 2 (a)(4)-(5), 126 Cong. Rec. S299 (1980).

“It is the purpose of this Act [enacting this chapter and provisions set out as notes under this section] to establish as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration.”

small entities also include a majority of establishments engaged as “third-party distribution systems,” other program distributors, broadcasting and wireless communications equipment manufacturers, and a host of educational institutions.¹¹

3. The FCC’s Regulatory Impact Analysis is Insufficient.

Under the RFA, the FCC is required to “prepare and make available for public comment an initial regulatory flexibility analysis [IRFA]” which will “describe the impact of the proposed rule on small entities.”¹² While the Commission did publish an IRFA in CS Docket No. 98-120, it failed to properly examine the impacts that the proposed regulation may have on small cable businesses. The missing economic analysis renders this IRFA insufficient.

Small cable representatives have suggested to Advocacy that the FCC’s proposed rule will impose substantial costs on their operations. The ACA¹³ specifically points out that the compliance costs associated with the Commission’s additional “must-carry” digital television (“DTV”) obligations will be impossible for thousands of smaller cable systems to support.¹⁴ While the FCC has allowed for the availability of waivers for small operators, ACA estimates that these small entities will need to pay over one thousand dollars per waiver, in addition to hiring legal

¹¹ Notice, *supra* note 1, at 54-57.

¹² 5 U.S.C. § 603 (a).

¹³ The ACA represents a number of smaller cable providers.

¹⁴ See, Re: American Cable Association (“ACA”); Notice of Ex Parte Presentation; CS Docket No. 98-120 (September 7, 2007) (explaining that smaller cable companies face an “impossible” economic burden from the costs associated with switching the technology and equipment needed to comply with the FCC’s rule).

assistance for the waiver process.¹⁵ Because the waivers must be filed on a per-system basis, some companies may have to file as many as 250 waivers; and a group of U.S. Senators estimates that the cost of compliance with the FCC's order is approximately \$75,000 per small cable operator.¹⁶ In addition to these administrative and legal costs, the regulatory impact analysis lacks an estimation of the costs due to the complexity of the FCC's system for filing a waiver. Once the waivers are filed there is no guarantee that the Commission will process them in a timely manner, and the large number of waivers that will need to be filed may further slow the process. While the rule will be burdensome for all small operators, the smallest cable operators face unique circumstances in that they lack the financial resources and the capacity needed to comply fully with the dual carriage rule. Therefore, it is critical that the FCC conduct the proper regulatory impact analysis and publish a new IRFA for public comment.

4. The FCC's Discussion of Alternatives Does Not Satisfy the RFA's Requirements

In addition to considering the economic impact of a proposed rule on small entities, the RFA requires an agency to describe significant alternatives that it has considered during the rulemaking process.¹⁷ While the FCC has listed four types of

¹⁵ Estimate provided by ACA.

¹⁶ See *Letter from the United States Senate to the Honorable Kevin. J. Martin, Chairman, Federal Communications Commission, signed by Senators Rockefeller, Lott, Dorgan, Snowe, Smith, DeMint, and Thune* (November 15, 2007) (stating further that "We can not find a compelling reason to force small cable operators to incur unnecessary financial hardship").

¹⁷ 5 U.S.C. § 603(c)(1)-(c)(4).

alternatives, the alternatives offered do not address or minimize the significant costs to small businesses. Advocacy urges the Commission to consider the following alternatives and any other meaningful alternatives the FCC receives during the comment period:

- **An exemption for the smallest cable providers**—Advocacy notes that ACA and NCTA have suggested that the Commission exempt small cable providers.¹⁸ Because the dual carriage requirements will have a disproportionate economic impact on the smallest carriers, Advocacy suggests that the FCC adopt an exemption for those carriers with 5,000 or fewer subscribers or those cable systems with an activated channel capacity of 552 Mhz or less. Because these small companies cannot sustain the costs or capacity needed to comply with this rule, an exemption would serve as the best alternative. Under such an alternative, small cable operators will be allowed to continue to carry and distribute analog channels until they develop the infrastructure to go digital.¹⁹ Moreover, it would not dilute the Commission's intended purposes in promulgating this rule.
- **A Different Compliance Timeline for Small Cable Operators**—Time, cost, and capacity are the major factors of this rulemaking that will have adverse affects on small cable operations. If the Commission cannot provide an

¹⁸ See ACA, *supra* note 17. See also, Letter from the National Cable and Telecommunications Association, Re: CS Docket No. 98-120 (February 19, 2008).

¹⁹ These small companies are working on this technology because they understand it will help them to gain more customers and become even more competitive.

exemption for small entities, Advocacy recommends that the Commission establish an extended compliance timeline so that they can spread the costs of compliance over a longer period of time.

5. The Telecom Act Requires the FCC to Take Measures to Enhance Competition in the Market for Cable Services.

Congress enacted the landmark Telecom Act in order to foster competition among the local, long distance, and cable markets.²⁰ Several sections of the Act codify the Commission's duty to promote competition in these markets. Because competition is such an important goal, it is critical that the FCC consider in its regulatory analysis how this proposed rule will impact the small cable providers that enhance the presence of competition in the market for cable services.

6. Conclusion

The RFA provides the necessary legal basis for granting small businesses special consideration in this rulemaking. Advocacy recommends that the FCC conduct the proper economic analysis of the impacts that this rule will have on small cable providers and publish that new analysis and a proper consideration of alternatives in a new IRFA. Additionally, Advocacy urges the Commission to adopt an exemption for the smallest carriers, or work with this small but important group of businesses to find other alternatives that will be less burdensome. Finally, Advocacy urges the Commission to be prompt and timely in its deliberations, as

²⁰ See Telecommunications Act of 1996, Pub. L. No. 104-104, § 253, Stat. 56 (codified at 47 U.S.C. § 253) (1996).

significant expenditures in equipment by the industry need to be planned for in light of the effective date for the transmission.

The Office of Advocacy is available to assist the Commission in its outreach to small business or in its consideration of the impact upon them. For additional information or assistance, please contact me or Cheryl Johns of my staff at (202) 205-6949 or cheryl.johns@sba.gov.

Respectfully submitted,

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Comment
U.S. Small Business Administration
07-170

FCC Dkt. No.

Washington, DC 20416

March 3, 2008

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via electronic filing

Certificate of Service

I, Cheryl M. Johns, an attorney with the Office of Advocacy, U.S. Small Business Administration, certify that I have, on this March 3, 2008, caused to be mailed, first-class, postage prepaid, a copy of the foregoing Comments to the following:

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